Supreme Court, U.S.
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No. 03-232

IN THE

Supreme Court of the United States

BAY OCEAN MANAGEMENT, INC.,

Petitioner,

v.

STEEL COILS, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

CHRISTOPHER E. CAREY
Counsel of Record
JOHN B. GOOCH, JR.
MONTGOMERY, BARNETT, BROWN,
READ, HAMMOND & MINTZ
3200 Energy Centre
1100 Poydras Street
New Orleans, LA 70163-3200
(504) 585-3200

Attorneys for Respondent

182963

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

Respondent takes issue with the Questions Presented by petitioner for the following reasons:

Petitioner's first stated Question, is, "Does the Carriage of Goods by Sea Act (COGSA) provide the exclusive remedy for cargo damage against the vessel and its manager?" The only Petitioner here is the vessel's manager, Bay Ocean Management, Inc. Although the vessel, M/V LAKE MARION, was sued *in rem*, neither the defendant vessel nor its owner have petitioned for a writ of *certiorari*. Thus, this issue should be limited to the vessel manager alone.

Petitioner's second Question confuses the respective duties of the COGSA carrier and the non-carrier manager. However, that confusion will be addressed in the Argument to follow.

Petitioner's third question is premised on a misstatement of the law. There is no split in the Circuits as to whether a non-carrier, vessel manager can be sued in tort outside the confines of COGSA. This Court and the lower federal courts, which have addressed this question, have unanimously answered it in the affirmative.

PARTIES TO THE PROCEEDING

The following are parties to this proceeding:

1. Steel Coils, Inc.
   Plaintiff/Respondent

2. Bay Ocean Management, Inc.
   Defendant/Petitioner

3. M/V LAKE MARION in rem
   Defendant

4. Lake Marion, Inc.
   Defendant

5. Western Bulk Carriers K/S Oslo
   Defendant/Third Party Plaintiff

6. Itochu International, Inc.
   Third Party Defendant

STATEMENT PURSUANT TO RULE 29.6

Pursuant to Supreme Court Rule 29.6, Respondent, Steel Coils, Inc., is no longer in existence. Steel Coils, Inc. discontinued doing business in 2001. The instant case is being pursued in Steel Coils, Inc.'s behalf by Mitsui Sumitomo Insurance Co., Ltd., successor to The Sumitomo Marine and Fire Insurance Company, Limited, the subrogated cargo insurer of Steel Coils, Inc. Mitsui Sumitomo Inc. states that it has no parent corporation and that no publicly held company owns 10% or more of its stock.

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SUMMARY OF THE ARGUMENT

Petitioner has failed to establish a basis for this Court to issue a writ of *certiorari* as established by the applicable criteria set forth in Supreme Court Rule 10. The Fifth Circuit's decision below did not conflict with a decision of another United States Court of Appeals on the same matter. Moreover, the decision below does not conflict with the decision by any state court of last resort. Finally, the decision below has not departed from the accepted and usual course of judicial proceedings, nor has it sanctioned such a departure by a lower court.

Petitioner has misstated the law in suggesting that a conflict exists among the Circuits on the issue of a non-carrier's liability in tort for its own negligence. No such conflict exists because the cases Petitioner relies upon do not stand for the proposition for which Petitioner cites them. Petitioner has failed to provide any authority in support of its interpretation of the Carriage of Goods by Sea Act, 46 U.S.C. § 1300, *et seq.* (COGSA).

The relief Petitioner seeks would require a revision of COGSA. Such a legislative revision is not the function of this Court. Moreover, managers like Petitioner may be afforded the protection of COGSA through the use of a clearly worded Himalaya Clause. Here, the carriers simply failed to include a Himalaya Clause in the contract of carriage.

REASONS FOR DENYING THE PETITION

A. *Petitioner has Failed to Establish a Basis for Issuance of a Writ of Certiorari*

No Conflict Among the Circuits

In the District Court below, Respondent filed a COGSA claim against the ocean carriers and a separate tort cause of action against the Petitioner alleging negligence. Petitioner argues that this Court should grant *certiorari* because of an alleged split between the Fifth and the Eleventh Circuits regarding whether a cargo owner can bring a separate tort action against a negligent, non-carrier. In support of its erroneous assertion, Petitioner relies upon two Eleventh Circuit cases: *Polo Ralph Lauren, L.P. v. Tropical Shipping & Construction Co., Ltd.*, 215 F.3d 1217 (11th Cir. 2000), and *Hayes-Leger Assocs., Inc. v. M/V ORIENTAL KNIGHT*, 765 F.2d 1076 (11th Cir. 1985). Neither case supports Petitioner's argument.

Polo did not involve a claim against a non-carrier. Rather, in *Polo* the cargo owner sought damages from *the carrier* alone for cargo lost overboard while in transit. The cargo owner filed claims against *the carrier* for breach of contract, bailment and negligence. The *carrier* filed a motion for summary judgment on the contract claim, or in the alternative to limit its liability to the value of the goods shipped to the manufacturer. The district court granted the *carrier's* motion for summary judgment on the contract claim because the cargo owner was not a party to the bill of lading. It also granted the *carrier* summary judgment on the bailment and negligence claims, ruling correctly, that cargo's claim against

the *carrier* was preempted by COGSA. Thus, *Polo* only addresses cargo's claim against a *carrier*; not a non-carrier.

The fatal flaw in Petitioner's argument that *Polo* creates a conflict here, is that it improperly lumps together claims against carriers with claims against non-carriers in its reference to "cargo damage cases such as these."[1] Petitioner either fails to recognize or deliberately ignores the fact that these are two separate types of claims: claims against carriers, which are covered exclusively by COGSA[2] and; negligence claims against non-carriers, such as agents, stevedores and managers, which sound in tort such as that brought by Respondent against Petitioner here. *Polo* stands only for the proposition that, where COGSA applies, it exclusively covers claims against "carriers." However, it does not address the availability of tort claims against non-carriers like Petitioner.[3]

In the *ORIENTAL KNIGHT*, the plaintiff's cargo was carried in five containers. Upon opening the containers at

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1. *See* Petition for Writ of *Certiorari*, p. 8.

2. Cargo claims are widely recognized as "hybrid" claims of tort and contract. (*See, e.g., Polo, supra*, p. 1220-1221; *Associated Metals & Minerals Corp. v. M/V ALEXANDER'S UNITY*, 41 F.3d 1007 (5th Cir. 1995); *Oriente Commercial, Inc. v. The American Flag Vessel*, 529 F.2d 223 (4th Cir. 1975).)

3. Petitioner acknowledges that in *Polo*, "not exactly the same fact situation was present . . . as is present here." However, Petitioner glosses over the seminal difference that, in fact, *Polo* did not address non-carrier liability. Instead, Petitioner suggests that, ". . . the different philosophies amongst the Circuits is readily apparent." (Petition for Writ of *Certiorari*, p. 8.) Petitioner fails to explain how the Circuits' respective philosophies differ or how that is relevant, let alone how a case that does not address non-carrier liability in tort creates a conflict with the instant case.

the time of delivery, it was discovered that the goods had been damaged as a result of seawater entering the containers. As the Eleventh Circuit pointed out, the sole issue on appeal was whether the district court failed to properly apply section 4(5) of COGSA; that is, whether each of the five containers constituted a COGSA "package" for purposes of applying the $500 per package liability limitation. There, the cargo plaintiff evidently employed the oft-used "scattershot" technique of suing every entity associated with the carriage transaction; filing five separate suits; all of which were consolidated for trial.[4] However, the Eleventh Circuit's opinion did not indicate that cargo brought a separate tort cause(s) of action against the vessel's manager. In fact, nowhere in the Eleventh Circuit's opinion did it even address the manager's tort liability. Simply put, the *ORIENTAL KNIGHT* has no bearing on the issue Petitioner has raised.

Neither of the two cases that Petitioner relies upon support its argument that there is a split among the Circuits on the issue of non-carrier liability. Neither case even discusses the issue. Petitioner has therefore, failed to demonstrate any split among the Circuits as contemplated by Rule 10(a).

No Conflict with a Decision by a State Court of Last Resort

The next enumerated criterion in Rule 10(a) is that the Circuit court, "has decided an important federal question in a way that conflicts with a decision by a state court of last

4. The Eleventh Circuit's opinion appears to suggest that individual suits were commenced on each of the five bills of lading that were issued. (*See ORIENTAL KNIGHT*, page 1081.)

resort." Petitioner has identified no such conflicts with a decision by any state court of last resort.

No Departure from Accepted and Usual Course of Judicial Proceedings

The final enumerated criterion in Rule 10(a) is that the Circuit court, "has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power." Petitioner has not alleged that the Fifth Circuit has departed from the accepted and usual course of judicial proceedings.

Distilled to its essence, Petitioner's argument is that the Fifth Circuit misapplied a properly stated rule of law; that a non-carrier, vessel manager can be held fully liable in tort for cargo damage caused by its negligence. Although the Fifth Circuit's decision is unquestionably a proper application of well-settled law, Rule 10 specifically notes that a writ of *certiorari* is rarely granted when the asserted error consists of the misapplication of a properly stated rule of law. Thus, even if the Fifth Circuit had misapplied the rule of law (which is clearly not the case), Rule 10 would not provide a basis for the Court's exercise of jurisdiction.

Petitioner has, therefore, failed to identify any basis for this Court to exercise its discretion to assert jurisdiction over this matter. To the contrary, Rule 10 suggests that granting *certiorari* in cases of this sort is rare. This case presents nothing so unique as to warrant a departure from that rubric. Therefore, the Petition for Writ of *Certiorari* should be denied summarily.

B. *Fifth Circuit's Decision is Consistent with Supreme Court and Other Circuits*

The Fifth Circuit's decision is based in large part upon, and is completely consistent with, this Court's decision in *Robert C. Herd v. Krawill Machinery Corporation*, 359 U.S. 297, 79 S. Ct. 766 (1959) and its progeny. In *Herd*, like the instant case, the cargo owner brought a tort action against a non-carrier, agent of the carrier (there a stevedore), for damage caused by the non-carrier's negligence. In another parallel to the instant case, in *Herd* the District Court found (and the U.S. Fourth Circuit Court of Appeal unanimously agreed) that the damage was caused by the agent's negligence; that the limitation of liability provisions of the bill of lading were, in express terms, applicable only to the carrier and did not apply to nor limit the agent's liability; and that the agent was liable for the full amount of the loss. Relying in part on its own prior decision in *Brady v. Roosevelt Steamship Co.*, 317 U.S. 575 (1943), this Court held that the carrier's agent was liable for its own negligence, and that the carrier's agent could not avail itself of the carrier's right to limit its liability under COGSA § 1304(5).[5]

In *Herd*, this Court reviewed the legislative history of COGSA and observed that section 1301(a) clearly defines "carrier" to include, "the owner or the charterer who enters into a contract of carriage with the shipper."[6] Moreover, this Court noted that COGSA § 1302, 1303 and 1304 impose particularized duties and obligations upon, and grants stated immunities to, the "carrier." Further COGSA § 1304(5) says

5. *See Tulane Maritime Law Journal*, Vol. 27, Number 2, Summer 2003, p. 648.

6. *Herd*, 359 U.S. 297 at p. 301.

that, "neither the carrier nor the ship shall be liable for more than $500 per package." As this Court stated, COGSA, ". . . makes no reference whatever to stevedores *or agents*." (emphasis added).[7]

Herd also pointed out that the legislative history of COGSA shows that it was, ". . . lifted almost bodily from the Hague Rules of 1921,"[8] the effort of which was, ". . . to establish the rights and liabilities of carriers and shippers *inter se* in international trade."[9] Further, the Court's review of COGSA's legislative history revealed, "nothing in the language, the legislative history or environment of the Act that expressly of impliedly indicates any indication of Congress to regulate stevedores or other agents of the carrier, or to limit the amount of their liability for damages caused by their negligence."[10] The Court could not have spoken more clearly than when it pronounced,

"Those Rules do not advert to stevedores or agents of a carrier."[11]

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7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*, pp. 301-302. (*See also, Citrus Marketing Board of Israel v. J. Lauritzen A/S*, 943 F.2d 220 (2d Cir. 1991) and *Cerro Sales Corp. v. Atlantic Marine Enterprises, Inc.*, 403 F. Supp. 562, 568 (S.D.N.Y. 1975) ("An agent of the carrier is not covered by the limitations of COGSA available to the carrier, and may be fully liable for its acts of negligence."))

11. *Id.*, p. 301. Notably, the Eleventh Circuit's opinion in *Polo* agreed that the purpose of COGSA was to achieve a balance between the respective rights and obligations of shippers and *carriers*. (215 F.3d 1217, 1220.)

C. *Petitioner Seeks a Revision of COGSA*

Based on nothing more than its own bald assertion that the way in which the shipping industry operates has changed substantially since COGSA was enacted in 1936, Petitioner seeks this Court's reversal of *Herd* and/or a revision of COGSA to expand its defenses and liability limitations to agents of the carrier.[12] The sweeping action Petitioner proposes is both unwarranted and unnecessary.[13] The situation in which Petitioner finds itself here is one which it and the carriers created, and one that was avoidable. Here, the carriers failed to employ a clearly worded Himalaya Clause of the type that has been widely used in the shipping industry for decades. Thus, it is not necessary for this Court to consider the reversal of 44 years of precedent that Petitioner requests.

Without any evidentiary support, Petitioner suggests that "nowadays" most vessels are owned by separate one-ship companies, and that all of the duties COGSA imposes on carriers/owners of such vessels are carried out by managers

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12. Petitioner later says, in the Conclusion of its Petition, that the industry has gone through significant changes since the *Herd* decision in 1959. It is, therefore, difficult to determine what period Petitioner is referring to (1936 to present, or 1959 to present), what industry changes Petitioner is concerned about or when Petitioner thinks things changed so drastically to require this Court to reverse its prior decision.

13. Unquestionably, inequities are presented by contemporary application of the 1936 COGSA. The most glaring inequity is the $500 per package limitation, which has remained unchanged for 67 years. If any section of COGSA demands revision, it is that. However, revision of COGSA is the function of Congress, not the Judiciary.

or other agents, like Petitioner.[14] Therefore, Petitioner argues, managers (and, by logical extension, *any* agents of a carrier who perform a "carrier" duty) should have the benefit of COGSA's per package limitation (and presumably all the other "carrier" defenses the Act provides.) Pretermitting the accuracy of Petitioner's unsupported factual assertions, this argument is baseless and ignores this Court's holding in *Herd*.

Herd Controls

COGSA imposes on the carrier the duties to properly and carefully load, handle, stow, . . . and discharge the cargo.[15] In *Herd*, the carrier hired a stevedore to load, handle and stow the cargo at the load port. The loss resulted from the carrier's agent's negligence in performing these "carrier" duties. The cargo owner sued the negligent agent in tort. This Court found that the agent was not a "carrier" because it was not a vessel owner or charterer who entered into a contract of carriage with the shipper. Therefore, the Court determined that, for all of the reasons described above, the carrier's agent could not avail itself of the carrier's per package liability limitation under COGSA § 1304(5).

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14. The "one-ship" model is a scheme developed by ship owners to reduce their financial risk by putting each vessel in the ownership of single entity so that in the event of a catastrophic loss, the registered owner's liability is effectively limited to the value of the ship, regardless of whether the "owner" can limit its liability under the Limitation of Liability Act, 46 U.S.C. §§ 181-189. As part of this arrangement, the vessel is managed by a separate entity (like Petitioner here), which generally has few, if any, assets of its own.

15. 46 U.S.C. § 1303(2).

Here, like in *Herd*, Petitioner contracted to perform several of the COGSA carrier's duties pursuant to its management agreement with the vessel owner, Lake Marion, Inc. The duties Petitioner contractually undertook included, but were not limited to, ensuring that the hatch covers and closing appliances were kept in good repair and that the holds were properly prepared to receive the intended cargo.[16] The management agreement did not relieve the carrier of its obligation to cargo to perform its statutory duties. Rather, as in *Herd* the carrier simply hired a third party to perform them. Also like the cargo owner in *Herd*, Respondent sued the non-carrier agent in tort, and the lower courts found that Petitioner was negligent and was not a "carrier" because it was not a vessel owner or charterer who entered into a contract of carriage with the shipper. The District Court found, and the Fifth Circuit agreed, that Petitioner was negligent in its performance of the duties it undertook and that said negligence caused the subject damages. Consequently, like in *Herd*, the agent was not able to take advantage of the carriers' liability limitation. *Herd* controls here because there, as here, the non-carriers contractually undertook to perform certain "carrier" duties; and in both cases the non-carriers were held liable to the cargo owner (without recourse to COGSA's carrier defenses) for damage to the cargo caused by their negligence in performing those duties. In neither case did the agent supplant the carrier. As evidence of this, here the carriers were found liable for the damage, but were able to avail themselves of COGSA's carrier liability limitation. Rather, in both cases, the agent simply contractually undertook to perform some of the carrier's duties.

16. However, contrary to its argument, Petitioner did not undertake *all* of the carriers' COGSA duties. For example, Petitioner did not load, stow or discharge the cargo. (*See*, COGSA, 46 U.S.C. § 1303(2)).

In *Herd*, this Court rejected precisely the same argument that Petitioner seeks to advance here. That argument was based on the Fifth Circuit's decision in *A.M. Collins & Co. v. Panama R. Co.*[17] The Supreme Court granted *certiorari* in *Herd* to resolve the conflict between the Fifth Circuit's holding in *Collins* and the Fourth Circuit's affirmance of the District Court's ruling in *Herd*. (As is noted above, no similar conflict between the Circuits exists here.) The Supreme Court found that *Collins* was, ". . . counter to a long-settled line of decisions of this Court" noting that, "From its early history this Court has consistently held that an agent is liable for all damages caused by his negligence, unless exonerated therefrom, in whole or in part, by a statute or a valid contract binding on the person damaged."[18] Here, no statute or valid contract binding on the person damaged exonerates Petitioner from the consequences of its negligence. Therefore, the same result as in *Herd* obtains.

Petitioner is Not a Carrier

Petitioner signed the Time Charter between its principal, the vessel owner, Lake Marion Inc., and time charterer, Western Bulk Carriers K/S, for Lake Marion, Inc. "AS AGENT ONLY." Petitioner signed "AS AGENT ONLY" because it clearly wanted to avoid the legal consequences of carrier status. Therefore, Petitioner was not a "carrier" of the cargo and could not avail itself of the carrier's per package liability limitation.

Petitioner assiduously avoided "carrier" status because COGSA not only imposes specific duties on carriers, but it

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17. 197 F.2d 893 (5th Cir. 1952).

18. 79 S. Ct. 766 (1959), at 770.

also creates presumptions that apply in COGSA's shifting burden of proof scheme.[19] For instance, where, as here, seawater damages the cargo, a presumption arises that the carrier has breached its duty to use due diligence to ensure that the vessel was seaworthy at the commencement of the voyage. The carrier must then carry the burden of proof to rebut that presumption. It must show that the unseaworthiness was not the result of a lack of due diligence at or before the commencement of the voyage, and/or that the loss resulted from one of COGSA's enumerated perils.[20]

By contrast, in a tort claim against a non-carrier, like Petitioner, cargo cannot rely on any presumption, even where seawater damage occurs. Instead, as Respondent did in the District Court in the instant case, cargo must carry the substantial burden of proving actual negligence on the part of the non-carrier.[21] Therefore, in the District Court, it was in Petitioner's best interest to avoid "carrier" status in order to require Respondent to prove actual negligence. Only *after* the District Court determined that Petitioner's negligence caused the damage and that Petitioner was liable in tort

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19. *See*, *Tulane Maritime Law Journal*, Vol. 27, Number 2, Summer 2003, p. 652.

20. *See, e.g.*, *Marubeni Transatlantic Marine Claims Agency, Inc. v. M/V OOCL INSPIRATION*, 137 F.3d 94 (2d Cir. 1998); *Jefferson Chemical Co. v. M/T GRENA*, 413 F.2d 864 (5th Cir. 1969); *Trade Arbed, Inc. v. M/V SWALLOW*, 688 F. Supp. 1095 E.D. LA 1988); *International Produce, Inc. v. S.S. FRANCES SALMAN*, 1975 A.M.C. 1521 (S.D.N.Y. 1975).

21. *See*, *Tulane Maritime Law Journal*, Vol. 27, Number 2, Summer 2003, p. 652. ("The difficulty of proving fault, especially when the negligence occurs at sea, may explain why tort claims against the vessel managers are infrequent.")

without benefit of the carriers' $500 liability limitation (and the Fifth Circuit agreed), did Petitioner decide that it would be better off being treated as a COGSA carrier.[22] To that end, Petitioner now seeks to have this Court overrule *Herd* and expand the definition of "carrier" to include non-carriers who undertake to perform the duties that Congress assigned to carriers in enacting COGSA. This Court has previously rejected similar attempts. There is no reason to expand COGSA now.

COGSA's Wording is Clear

Alternatively, Petitioner makes an unsupported attempt to manipulate COGSA's definition of "carrier" in an unreasonably expansive way. COGSA defines "carrier" as follows, "*The term "carrier" includes the owner or the charterer who enters into a contract of carriage with a shipper.*" (COGSA § 1301(a)). Petitioner argues that this definition is unclear and open-ended because of the use of the word "includes." To Petitioner the word "includes" implies that there may be other entities that fit within the definition. Notably, Petitioner fails to cite a single authority that endorses this view.[23]

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22. *E.g.*, in its Eleventh Defense to Respondent's original Complaint, Petitioner stated that it was **not** a carrier of the goods.

23. Morever, had Congress intended "*includes*" to be open ended so as to refer to non-carriers, as Petitioner argues, it would likely have used the phrase, "*but is not limited to*" immediately after, and to modify "*includes*." This commonly used legal phrase shows that a list is not exclusive; a device that was surely known to the drafters. Petitioner offers no explanation why Congress would not have used such a simple phrase if its intent was to include entities other than the owner or charterer who enters into a contract of carriage with the shipper in the definition of "*carrier*."

The plain reading of the statute is that the term "carrier" *includes* two categories of entities: a.) owners and/or; b.) charterers. The clear wording of the statute immediately modifies the words, "*the owner or the charterer*" with the phrase, "*who enters into a contract of carriage with a shipper.*"[24] Therefore, Congress intended COGSA to apply only to the carrier; ie., the owner or charterer who has entered into a contract of carriage with a shipper. Non-carriers are all other parties who have not entered into such a contract of carriage. As this Court pointed out in *Herd* the Legislative History of COGSA reveals no indication that Congress intended to protect non-carriers under COGSA.[25]

Petitioner continues this manipulation by taking a single phrase from COGSA out of context and suggesting that the reference in that phrase to, "*or other persons*", means that entities other than carriers are covered by the Act. Again, Petitioner cites no authorities in support of this argument. Moreover, Petitioner ignores the overwhelming weight of authority from his Court, lower courts and commentators that COGSA applies only to carriers.[26] Further, Petitioner does not provide even the full text of the sentence from which it extracted the phrase. The quoted phrase comes from the last sentence of Section 1304(1), which reads as

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24. *See, e.g., Herd, supra*; *Citrus Marketing, supra.*

25. *See also Tulane Maritime Law Journal*, Vol. 27, Number 2, Summer 2003, p. 652.

26. *See, e.g., Herd, supra*; *Citrus Marketing, supra*; *Polo, supra*; Schoenbaum,T. J., *Admiralty and Maritime Law*, Third Edition, Vol. 2, Sec. 10-15; *see also* Reilly, Mary T., "*Identity of the Carrier: Issues Under Slot Charters*" Tulane Maritime Law Journal, Vol. 25, No. 2, Summer 2001, p. 505.

follows, "*Whenever loss or damage has resulted from unseaworthiness, the burden of proving the exercise of due diligence shall be on the carrier or other persons claiming exemption under this section.*" (COGSA § 1304(1).) This sentence simply establishes where the burden of proving due diligence lies in a case where unseaworthiness has been shown to be the cause of the loss. Notably, earlier in section 1304, the statute refers to "*the carrier nor the ship.*" Since the last sentence only refers by name to the carrier, a simple reading of the phrase "*or other persons*" in the context of the entire section, is that it means the ship. There is no support whatsoever, for the suggestion that the use of the phrase "*or other persons*" opens COGSA's doors to non-carriers.

Petitioner's argument that COGSA's "error in navigation" defense[27] creates a dilemma is similarly groundless. Regardless of who employs the vessel's Master, if the loss is caused by an error in navigation, the carrier(s), (ie., the owners and/or charterer who entered into a contract of carriage with the shipper) would be entitled to the defense.[28] However, the error in navigation defense is not at issue in this case. Moreover, any perceived "dilemma" that might arise, can be prevented by inclusion of a clearly worded Himalaya Clause in the bill of lading and/or contract of carriage. As the lower courts observed, there was no Himalaya Clause in any of the critical documents here.

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27. 46 U.S.C. § 1304(2)(a)).

28. *See, e.g., Folger Coffee Co. v. OLIVEBANK*, 201 F.3d 632 (5th Cir. 2000).

Petitioner's Failure to Include Clearly Worded Himalaya Clause

For several decades carriers have inserted clauses into contracts of carriage which expand the coverage of COGSA to parties other than the "carrier." These so-called Himalaya Clauses are named after the ship that was involved in the landmark Australian case of *Adler v. Dickinson*, [1955] 1 Q.B. 158, which found that the limitations of liability afforded to a carrier by a contract of carriage can be extended to the carrier's agents, employees and contractors. Courts addressing Himalaya Clauses have generally held that they must be strictly construed and that they must be clearly worded.[29] In *Citrus Marketing*, *supra*, the Second Circuit discussed whether a Himalaya Clause could extend to a vessel manager. The court stated that it, "perceived no principled basis for excluding such an application in an appropriate case."[30] Presumably, an "appropriate case" would be one where the manager was specifically mentioned in the Himalaya Clause.

Here, however, there was no Himalaya Clause at all in the bill of lading or in any relevant charter party. Petitioner goes to great lengths to point out that it was the "personification" of the registered vessel owner and that the owner could enter into contracts only under the auspices of the manager. If such is the case, Petitioner was responsible

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29. *See, e.g., Institute of London Underwriters v. Sea land Service, Inc.*, 887 F.2d 761 (9th Cir. 1989); *Certain Underwriters at Lloyd's v. Barber Blue Sea Line*, 675 F.2d 266 (11th Cir. 1982); *Brown & Root, Inc. v. M/V PEISANDER* , 648 F.2d 415 (5th Cir. 1981); *Tessler Bros. (B.C.) Ltd. v. Italpacific Line*, 494 F.2d 934 (2d Cir. 1974).

30. 943 F.2d 220 (2d Cir. 1991), at 223 n.4.

for the review of all contracts it signed on behalf of its principal. It cannot now complain that the terms of the contract it signed "AS AGENT ONLY"on behalf of its principal lacked the necessary protection it now seeks.

CONCLUSION

There is no conflict among the circuits on the issue presented herein. The Fifth Circuit's decision does not conflict with a decision from any state's court of last resort. The Fifth Circuit's decision does not depart from or encourage another court to depart from the accepted and usual course of judicial proceedings. This case satisfies none of the specific criteria established by Rule 10, nor is it of the character of cases contemplated by that Rule. Therefore, Petitioner has failed to establish any basis for this Court to grant *certiorari*.

COGSA establishes the respective rights and obligations of shippers and carriers. It specifically defines carrier as the vessel owner or charterer who enters into a contract of carriage with the shipper. Petitioner was unquestionably not a "carrier" of the subject cargo, since it was neither an owner nor a charterer of the vessel and did not enter into a contract of carriage with the shipper. Therefore, COGSA does not apply to claims against non-carriers like Petitioner.

Aware that the great weight of authority precludes applying COGSA to claims against non-carriers, Petitioner seeks to expand the definition of "carrier", or at least the scope of entities that can benefit from COGSA's carrier defenses and limitations. This Court has already addressed and rejected the arguments Petitioner offers. Petitioner has suggested nothing that warrants such a substantial change in

the Court's interpretation of COGSA; particularly since the protection Petitioner seeks was available to it in the form of a clearly worded Himalaya Clause. Petitioner's failure to ensure that it was protected by such a clause is not a basis for this Court to exercise its discretion to grant *certiorari.*

Respectfully submitted,

CHRISTOPHER E. CAREY
Counsel of Record
JOHN B. GOOCH, JR.
MONTGOMERY, BARNETT, BROWN,
READ, HAMMOND & MINTZ
3200 Energy Centre
1100 Poydras Street
New Orleans, LA 70163-3200
(504) 585-3200

Attorneys for Respondent